

## **CHAPTER 4.**

# **IMPLEMENTATION AND RECOMMENDATIONS**

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This chapter includes information and recommendations necessary to implement plan goals, intent, and guidelines throughout the planning area.

### **PLAN IMPLEMENTATION BY THE DEPARTMENT OF NATURAL RESOURCES**

This plan serves as a management plan for the Department of Natural Resources Division of Land and Water Management (DLWM) and supplements the Bristol Bay Area Plan. DLWM will implement the plan based on authorities as described in Title 38 of the Alaska Statutes and associated regulations. Applications for uses of state land will be considered by the Regional Manager, Department of Natural Resources, Division of Land and Water Management, Southcentral Region, P.O. Box 107005, Anchorage, Alaska 99510-7005.

### **PLAN IMPLEMENTATION BY THE ALASKA COASTAL MANAGEMENT PROGRAM**

This plan serves as an Area which Merits Special Attention (AMSA) plan and supplements the Bristol Bay Coastal Management Plan (BBCMP). The AMSA plan and the BBCMP will be implemented by the Alaska Coastal Management Program (ACMP) through the coastal consistency review process described under Title 46 of the Alaska Statutes and associated regulations. The provisions of these plans will be implemented under the authorities of the ACMP and Alaska departments of Natural Resources, Fish and Game, and Environmental Conservation.

Policies of the AMSA plan and the BBCMP will guide coastal consistency determinations by state agencies and coastal consistency recommendations by the Bristol Bay Coastal Resource Service Area (BBCRSA). Coastal consistency recommendations will be made in the manner described in the BBCMP by the Director, Bristol Bay Coastal Resource Service Area, P.O. Box 849, Dillingham, Alaska 99576.

The policies of these plans apply to regulated land and water uses and activities on state and private lands which directly affect the portion of the overall planning area that is within the coastal area. Although federal lands are excluded from the coastal area, activities on federal lands and lands held in trust by the federal government are subject to consistency with this plan and the BBCMP pursuant to Section 307 of the (federal) Coastal Zone Management Act. Subject uses also include "uses of state or national concern" which are defined in AS 46.40.210 and in CPC Resolution Number 13.

Within the planning area, the coastal area includes the following land and waters:

1. All land and water below 200 feet in elevation above mean sea level.
2. A one-mile corridor from ordinary high water on each bank of all waters used for spawning, rearing, and migration by anadromous fish.
3. A 200-foot corridor from ordinary high water on each bank of all tributaries of anadromous waterbodies, from their headwaters to their confluence with the anadromous waterbody.

The state maintains a list of permits and other activities requiring agency approvals that are subject to a coastal consistency determination with the ACMP in accordance with 6 AAC 50. Activities on this list which are classified as "categorical approvals" and "general concurrences" have been determined to be consistent with the ACMP without further review. "Individual project review" activities must be individually reviewed by the state and BBCRSA to determine consistency with the ACMP. Activities associated with the use and development of private lands, in most cases, do not require permits subject to individual consistency review. Thus this plan primarily addresses management of public land.

Uses that are consistent with the policies of this plan will be considered proper uses during coastal consistency review according to 6 AAC 80.160(7)(A). Uses that are not consistent with the policies of the plan will be considered improper uses.

The new Lake and Peninsula Borough is expected to assume planning powers before Spring, 1990. After it assumes planning powers, the new borough will be responsible for coastal management and implementation of the AMSA plan and the BBCMP within its boundaries in accordance with AS 46.40.090.

## **PUBLIC TRUST DOCTRINE**

Under the Alaska Constitution the state has special duties and management constraints with respect to state-owned land underlying navigable waters. The Alaska Constitution contains principles commonly known as the public trust doctrine. That doctrine requires the state to exercise authority to ensure that the right of the public to use navigable waters for navigation, commerce, recreation, and related purposes is not substantially impaired.

The Alaska Constitution (Article VIII, sections 1, 2, 3, 6, 13, and 14) and Alaska Statutes (38.05.127 and 38.05.128) are the legal basis for applying the public trust doctrine in Alaska. This doctrine guarantees the public right to engage in such things as commerce, navigation, fishing, hunting, swimming, and protection of areas for ecological study.

The Constitution provides that "free access to the navigable or public waters of the state, as defined by the legislature, shall not be denied any citizen of the United States or resident of the state, except that the legislature may by general law regulate and limit such access for other beneficial uses or public purposes." Eliminating

private upland owners' reasonable access to navigable waters may result in compensation.

Because 99 percent of Alaska was in public ownership at statehood, both federal and state laws providing for the transfer of land to private parties also provide for public access to navigable waters. Implementing the state constitutional guarantee of access to navigable waters under Article VIII, Section 14, AS 38.05.127 requires that the state commissioner of natural resources must "provide for the specific easements or rights-of-way necessary to ensure free access to and along the body of water, unless the commissioner finds that regulating or eliminating access is necessary for other beneficial uses or public purposes."

It has never been held that any lands normally subject to the public trust doctrine in Alaska are exempt from it, including land occupied and developed.

These statutes and concepts are considered and used throughout this plan. Any management actions will be consistent with the public trust doctrine as defined by the Alaska Constitution, statutes, court decisions, and public involvement.

## **PROCEDURES FOR PLAN REVIEW, MODIFICATION, AND AMENDMENT**

Categories of management intent, policies, implementation actions, and management guidelines of this plan may be changed if conditions warrant. The plan will be updated periodically as new data and new technologies become available and as changing social or economic conditions place different demands on state lands.

### **Periodic Review:**

The planning team should be consulted annually to determine problems and concerns with the plan or its implementation. The plan will be reviewed approximately once every five years to determine if revisions are necessary. An interagency planning team including Department of Natural Resources (DNR), Department of Fish and Game (ADF&G) and Bristol Bay Coastal Resource Service Area (BBCRSA) will coordinate this review. A meeting of the Nushagak and Mulchatna Rivers Recreation Management Plan Advisory Board also may be held annually to review the plan.

### **Changes to the Plan:**

This plan is both a DNR management plan prepared under the authorities of Title 38, and an AMSA plan prepared under Title 46. Criteria and procedures for changes must be consistent with the authorities of DNR and of ACMP.

Under DNR authorities, there are three types of changes to a plan: amendments, special exceptions, and minor changes. Amendments and special exceptions are plan revisions subject to the planning process requirements of AS 38.04.065; minor changes are not. DNR determines what constitutes an amendment, special exception, or a minor change. Under the authority of ACMP, there are two types of changes: significant amendments, and routine program implementations (RPI). DGC in consultation with state agencies determines what constitutes a significant amendment or a RPI. The procedures outlined below incorporate both the DNR and ACMP requirements.

Most of the time, an amendment under DNR statutes will be a significant amendment under ACMP statutes, and the reverse is also true. Most of the time, a special exception or minor change under DNR statutes will be a RPI under ACMP regulations.

Changes to the plan may be proposed by agencies, municipalities, or members of the public. Requests for changes should be submitted to the Southcentral Regional Office of the Division of Land and Water Management, Alaska Department of Natural Resources, or to the Bristol Bay Coastal Resource Service Area.

**General Procedures:** Once an application for a change to the plan is made, DNR will determine if the proposed change is a plan amendment, special exception, or minor change under DNR statutes; DGC will determine if the proposed change is a significant amendment or RPI. DNR will distribute the proposed change and the agencies' determinations to the NMRRP planning team agencies according to the procedures in this plan.

Plan amendments, special exceptions, and minor changes must be approved by DNR. RPIs may be approved by DGC on behalf of the Coastal Policy Council pursuant to 6 AAC 85.120; significant amendments must be approved by the Coastal Policy Council. Both RPIs and significant amendments must also be approved by the federal Office of Ocean and Coastal Resource Management. To accomplish these decisions, the planning team will first make its recommendation. If practical, public review under DNR and ACMP requirements should occur simultaneously. Where this occurs, the time periods allowed for public notice required by DNR and ACMP authorities will run concurrently; thus, the notice period will equal the longest required time period. If necessary, public meetings or hearings may be held to discuss the proposed change; however, under 6 AAC 80.150 a public hearing is required for a significant amendment under ACMP.

Final decision by DNR should occur simultaneously with a decision by the Coastal Policy Council. A change that is a significant amendment or RPI (ACMP) will not be effective until it receives federal approval and the state files the change with the Lieutenant Governor.

State agencies or other interested parties may petition the Coastal Policy Council directly under 6 AAC 85.185 for changes under ACMP jurisdiction. Such a petition will follow the procedures outlined in 6 AAC 85.185. However, before petitioning the council, a petitioner must follow the procedures outlined in this plan.

Currently, 11 AAC 55.030(f) provides modification procedures for DNR management plans such as the Nushagak and Mulchatna Rivers Recreation Management Plan. These regulations are likely to be revised within the next year. It is expected that the present regulations will be expanded to include procedures similar to those described below. When new regulations are adopted, they will supersede the pages that follow and will direct plan modification procedures. In the interim, the current regulations and procedures below will guide plan modification. Because this is a joint plan, any plan modifications must also be consistent with the requirements of the Alaska Coastal Management Program. Should any regulations supercede these plan modification procedures, they will be processed as an RPI under ACMP.

## **1. Plan Amendments (DNR) and Significant Amendments (ACMP)**

**Plan Amendments (DNR).** Under DNR regulations, a plan amendment permanently changes the land use plan by adding to or modifying the basic intent of the plan. Changes to the management intent for a unit, changing the allowed or prohibited uses, policies, or guidelines, reclassification, and changing some implementation actions constitute amendments.

The following actions are examples of changes that would require an amendment:

- a proposal to prohibit a use that is now a designated use; or, conversely, to allow a prohibited use; or
- a proposal to close an area to mineral entry.

An amendment is a revision to a land use plan and according to AS 38.04.065, revisions must be adopted by the commissioner of DNR.

**Significant Amendments (ACMP).** Under 6 AAC 85.900(11), a "significant amendment" means an amendment to an approved district program which (A) results in a major revision, addition or deletion to the policies, implementation methods or authorities in the plan under 6 AAC 85.090 and 6 AAC 85.100; (B) alters the district boundaries, other than technical adjustments; (C) designates an area which merits special attention or alters an existing area which merits special attention designation; or (D) restricts or excludes a use of state concern not previously restricted or excluded."

Significant amendments require the approval of the Coastal Policy Council and the federal Office of Ocean and Coastal Resource Management.

***Procedures for Amendments.*** The Department of Natural Resources will convene the planning team as needed to make recommendations on plan amendments.

A. The commissioner and BBCRSA will prepare a written document that specifies:

- the reasons for the amendment, such as changed social or economic conditions;
- the alternative course of action (what the plan is being changed to); and
- why the plan amendment is in the best public interest.

B. Where practical, the document should be part of or circulated with a finding required by AS 38.05.035(e) or the applicable ACMP determination.

C. Before making the final decision on the amendment, DNR will provide for meaningful participation in the planning process and public notice consistent with AS 38.04.065(b)(8) and 38.05.945. The notice may be combined with notice given by DGC required under ACMP statutes. These notifications will include the points described in A.

## **2. Special Exceptions**

**Special Exceptions (DNR).** Under DNR regulations, a special exception does not permanently change the provisions of the plan. Instead, it allows a one-time limited-purpose variance of the plan's provisions, without changing the plan's general management intent or guidelines. Special exceptions may be made if complying with the plan is excessively burdensome, impractical, or inequitable to a third party; and if the purposes and spirit of the plan can be achieved despite the exception.

Special exceptions may also occur when the proposed activity requires only a small part of a management unit, does not change or modify the general management intent, and serves to clarify or facilitate the implementation of the plan. Special exceptions may apply to prohibited uses or guidelines.

The following actions are examples of changes that would be special exceptions:

- allowing a prohibited use based on more detailed data in a small area on the edge of a management unit next to a unit where it is allowed; or
- a preference right granted under AS 38.05.035(e) where the director determines such an action is necessary to correct an injustice and will not significantly affect the intent of the plan.

A special exception is a revision to a land use plan and according to AS 38.04.065; revisions must be adopted by the commissioner of DNR.

**ACMP.** ACMP regulations have only two categories: significant amendments and RPIs. If a special exception is also an ACMP significant amendment, the decision process will follow the procedures of both special exceptions and amendments (the two processes are very similar.) If a special exception is an RPI, it will follow the procedures explained under this section.

***Special Exceptions to Guidelines Modified by "Will."*** Special exceptions to guidelines modified by the phrase "will" may be allowed for individual actions. The decision not to follow a pertinent guideline modified by the term "will" will be consistent with the procedures for special exceptions.

***Procedures for Special Exceptions.*** The Department of Natural Resources will convene the planning team as needed to make recommendations on special exceptions.

A. The commissioner and BBCRSA will prepare a written document that specifies:

- the reasons for the special exception (i.e., why a variance of the plan's provisions is needed);
- the alternative action or course of action to be followed;
- why the special exception is in the best public interest; and

- how the general intent of the plan and management unit will be met by the alternative course of action.
- B. Where practical, the document should be part of or circulated with a finding required by AS 38.05.035(e).
- C. Before making the final decision on the special exception, DNR will provide for meaningful participation in the planning process and public notice consistent with AS 38.04.065(b)(8) and 38.05.945. The notice may be combined with notice given by DGC required under ACMP statutes. These notifications will include the points described in A.

### **3. Minor Changes (DNR) and Routine Program Improvements (ACMP)**

Minor changes and routine program improvements (RPIs) may be needed for clarification, to make technical corrections, or to facilitate implementation of the plan. Neither minor changes nor routine program improvements modify or change the basic intent of the plan or a management unit. The decision to make minor changes or RPIs will be made through normal inter-agency processes.

For DNR, minor changes are made at the discretion of the regional manager and do not require public review. The regional manager's decision may be appealed to the director. The director's decision may be appealed to the commissioner.

Decisions to process a change as an RPI are made by DGC. For both decisions, planning team and other affected agencies will be notified and have an opportunity to comment; the comment period may be provided through existing inter-agency review processes for associated actions.